In the Supreme Court of the United States

OCTOBER TERM, 1960

No. 730

STANDARD OIL COMPANY OF CALIFORNIA,

Petitioner,

v.

STATE OF WASHINGTON,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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In the Supreme Court of the United States

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No. 780

STANDARD OIL COMPANY OF CALIFORNIA, *Petitioner*,

v.

THE STATE OF WASHINGTON, *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

I

STATUTES INVOLVED

The petitioner has failed to cite the key Washington statute involved in this case which *imposes* the tax to which petitioner objects.

The omitted statute, which determines, at least nominally, the legal incidence of taxation, provides that:

> "There is levied and shall be collected from every person a tax for the act or privilege of engaging in business activities. Such tax shall be measured by the application of rates against value of products, gross proceeds of sales, or gross income of the business, as the case may be." (RCW 82.04.220[1])

The only portion of the applicable excise tax act cited by petitioner is section 82.04.270 which establishes the classification of business activities under which petitioner's operations fell during the audit periods in question in this case.[2]

Petitioner would have it appear that the tax falls upon transportation and, in turn, interstate commerce, while the facts and the law of this case are that the incidence of taxation is upon the "privilege of engaging in business activities" in the state of Washington. (RCW 82.04.220)

Thus RCW 82.04.220 imposes a tax upon *every* person "engaging in business activities" within the state of Washington. In turn, RCW 82.04.150 defines "engaging in business" as:

> "* * * commencing, conducting, or continuing in business and also the exercise of corporate or franchise powers as well as liquidating a business when the liquidators thereof hold themselves out to the public as conducting such business."

---

[1]Revised Code of Washington, or "RCW".

[2]Appendix A sets forth in seriatim the imposing section (RCW 82.04.220, *supra*) together with applicable statutory definitions of the same chapter.

The tax is *measured* by the application of applicable rates against "the value of products, gross proceeds of sales, or gross income of the business": in this case by RCW 82.04.270(2).

Other portions of this chapter of the Revised Code of Washington establish classifications of business activities subjected to taxation by the same section which imposes the tax on petitioner's business activities in this case.[1]

RCW 82.04.270 defines the classifications of business activities engaged in by petitioner which are subject to the tax imposed by RCW 82.04.120, and for which the petitioner was assessed taxes in this case. Thus:

> "(1) Upon every person except persons taxable under subsection (1) of RCW 82.04-.260 engaging within this state in the business of making sales at wholesale; as to such persons the amount of tax with respect to such business shall be equal to the gross proceeds of sales of such business multiplied by the rate of one-quarter of one percent.
>
> "(2) The tax imposed by this section is levied and shall be collected from every person engaged in the business of distributing in this state articles of tangible personal property, owned by them from their own warehouse or other central location in this state to two or more of their own retail stores or outlets, where no change of title or ownership occurs, the intent hereof being to impose a tax equal to the

[1]See Appendix B.

wholesaler's tax upon persons performing functions essentially comparable to those of a wholesaler, but not actually making sales: *Provided*, That the tax designated in this section may not be assessed twice to the same person for the same article. The amount of the tax as to such persons shall be computed by multiplying one-quarter of one percent the value of the article so distributed as of the time of such distribution: *Provided*, That persons engaged in the activities described in this subsection shall not be liable for the tax imposed if by proper invoice it can be shown that they have purchased such property from a wholesaler who has paid a business and occupation tax to the state upon the same articles. This proviso shall not apply to purchases from manufacturers as defined in RCW 82.04.110. The tax commission shall prescribe uniform and equitable rules for the purpose of ascertaining such value, which value shall correspond as nearly as possible to the gross proceeds from sales at wholesale in this state of similar articles of like quality and character, and in similar quantities by other taxpayers. * * *"

It will be noted that RCW 82.04.270 is primarily directed to wholesalers, and imposes a business and occupation tax upon the privilege of engaging in the business activity of making wholesale sales within the state of Washington. In this case, however, the petitioner's business activities here in question fall clearly under the statutory classification of the second section of RCW 82.04.270. Petitioner paid with-

out protest its taxes that were assessed for business activities within RCW 82.04.270(1).

This court may take judicial notice of the fact that the second section of RCW 82.04.270 has the effect of a compensating tax and is obviously designed to place large integrated business activities (like Standard Oil Company of California) which accomplish wholesaling within their own business organization on a par with "independent" competing business activities that are not so vertically integrated.[1]

Thus, the legislature has declared that the purpose of subsection (2) of RCW 82.04.270 is " * * * to impose a tax equal to the wholesaler's tax upon persons *performing functions* essentially comparable to those of a wholesaler, but not actually making sales." (Emphasis supplied.)

II

QUESTIONS PRESENTED FOR REVIEW

Respondent does not concede that there is a legitimate federal question presented to this court

---

[1]Obviously independent business activities falling under RCW 82.04.270(1) (wholesalers) would pay a wholesaler's business and occupation tax for the privilege of engaging in such business activities. Persons engaging in retailing business activities in the state of Washington would likewise pay a business and occupation tax for the privilege of engaging in that particular classification of business activity. Since the measure of taxation is in each case the gross receipts from sale of products by the wholesaler and retailer, an advantage over the independent business would be gained by large integrated competitors like Standard Oil Company of California who are able to conduct integrated merchandising activities from the manufacturing to wholesaling and thence to retailing, but for the classification of business activities accomplished by subsection (2) of RCW 82.04.270.

for review. Petitioner approaches this court assuming that the incidence of the tax is "upon transportation." Petitioner has not justified, and cannot justify, this assumption.

Thus the question put to this court is not, as suggested by petitioner, "whether the tax involved was unconstitutional as applied to transportation of petroleum products," since by no legal test in existence can this court conclude that the tax is a "tax upon transportation."

Before we accept even for purposes of argument the thesis of the petition, this court must first determine what is the legal incidence of taxation involved in this case: It should then determine whether the petitioner's business activities are even remotely related to interstate commerce: Even if both of the foregoing are resolved contrary to respondent's position set forth below, petitioner's case becomes at best a question of *whether the statutes in question, as applied to its business activities within the state of Washington, result in an unreasonable burden upon interstate commerce.*

III

COUNTERSTATEMENT OF THE CASE

A. The Statute Imposes a Tax Upon "Business Activities" Conducted Entirely Within the State of Washington.

Throughout its Petition, the petitioner has obfuscated the true nature of the tax in question. It

has repeatedly asserted that the tax amounts to an impost upon interstate commerce. It is aided in its desire to reach this conclusion by a mysterious process of transposition of terms; thus, it takes the phrase "distribution of products" from the classification section of the act (RCW 82.04.270(2)) and substitutes the word "transporting." The phrase "distribution of products from a warehouse or other central location to two or more of its own retail stores or outlets * * *" then becomes "transportation of products from a warehouse or other central location to two or more of its own retail stores or outlets * * *" and petitioner then draws the conclusion that the taxable incidence is borne directly by "interstate commerce."

B. PRODUCTS INVOLVED IN PETITIONER'S BUSINESS ACTIVITIES HAD COME TO REST BEFORE TAXABLE EVENT OCCURRED.

We repeat, however, that this tactic ignores both the imposing section of the statute and the facts of the case which were clearly established at the trial and were correctly summarized in the Washington Supreme Court's opinion of the matter. Now, the fact is that the classification in question might have been stated to require a business and occupation tax for the privilege of engaging in the transportation business within the state of Washington. But that is not the law and it is not in accord with the facts. Petitioner is not in the transportation business—it

is in the business of wholesaling and wholesale distribution of products which it manufactures for sale. In any event, the trial court's findings of fact completely eliminate any question as to whether the petitioner's products were moving in interstate commerce when the transactions constituting the privileged "business activity" took place, even if we were to assume that the tax was intended to tax petitioner's engagement in transportation activities.

Thus the trial court found affirmatively that the petroleum products which were involved in the business activities subject to the business and occupation excise tax were placed in *storage* within the state of Washington before the business activities that were subjected to taxation here were undertaken. The trial court actually struck in pen and ink from petitioner's proposed findings of fact the term "continuous" from the phrase "continuous movement," and the word "temporary" from the phrase "temporary storage." (See Finding of Fact No. 5, Tr. 12-18.) The trial court also struck in pen and ink the whole of petitioner's proposed Conclusion of Law No. 5 which petitioner had urged to the trial court in support of its contention that the products were in the course of interstate commerce at the time the business activities involving them were commenced.

Thus it is hoped that this court will bear in mind that the trial court considered that the products involved in the business activities subject to this tax had come to rest within Washington.

C. TRANSPORTATION WAS ONLY INCIDENTAL TO PETITIONER'S BUSINESS ACTIVITIES WHICH WERE SUBJECTED TO TAXATION.

An examination of the record will disclose that the state of Washington went to great pains during the trial of this matter and during the process of taxation to exclude from the tax base the proceeds of any business transactions which involved products which had not come entirely to rest within the state of Washington. To illustrate this fact, reference to Appendix C (which was set forth in the respondent's brief to the Washington State Supreme Court, at page 9 of its brief) will illustrate the ordinary flow of the petitioner's manufactured products utilized at the various stages of its highly integrated business and merchandising empire. As illustrated, all of Standard's products were accumulated at tank farms within the state of Washington before any of its subsequent business activities were assessed taxes in support of the government of the state of Washington.

Thus petitioner's business activities subjected to the Washington business and occupation tax which are involved in this case are confined solely and entirely to "wholesaling functions" conducted entirely within the state *subsequent* to the accumulation and storage of products at the petitioner's tank farms *within the state of Washington.*

D. PETITIONER'S BUSINESS ACTIVITY IS MERCHANDISING (WHOLESALING AND WHOLESALE FUNCTIONS).

As explained by the author of the Washington State Supreme Court opinion in this matter:

> "During the period involved in this suit, 58.2 per cent of the dollar value of products handled by bulk plants was sold or transferred for resale to retail service stations, dealers, jobbers and cooperatives. The wholesale tax on these transfers was paid without protest.
>
> "The remainder of the products were sold at bulk prices and in bulk quantities for business use to industrial, commercial, and agricultural consumers and to government and marine vessels. The prices were determined according to quantity and were influenced by the competitive prices of other suppliers. * * *
>
> "Retail sales taxes, imposed under RCW 82.04.250, were paid on the latter transactions. It was the theory of the tax commission, in levying the taxes in question, that to the extent that retail sales were made from the bulk plants, they were 'retail stores or outlets' within the meaning of RCW 82.04.270(2), and that the transfer of the plaintiff's products from its terminals to its bulk plants, to the extent that those products were later sold directly to consumers, was a *wholesale function within the meaning of that statute.*" (Emphasis supplied.) *Standard Oil Co. of California v. The State of Washington*, 156 Wash. Dec. 754, 355 P. (2d) 349, at 756.

In other words, the tax fell upon petitioner as a direct consequence of its exercise of its corporate franchise *within* the state of Washington. The particular business activities in question here are defined as "wholesale functions." Transportation of the merchandise involved in these business activities was only indirectly involved. And even so, it was entirely *intra*-state.

It is submitted that interstate commerce is no more involved in this case than it is in the process of movement of a can of beans from a grocer's shelf to the kitchen table.

IV

ARGUMENT

A. Respondent's Argument in Opposition to Petition for Writ of Certiorari.

1. No Burden on Interstate Commerce: Petitioner's Activities Are Entirely Local.

We think that the author of the Washington State Supreme Court decision in this matter correctly concluded that it is " * * * clear beyond question that the test, when applied to the activities subjected to taxation in this case reveals that no undue burden on interstate commerce is imposed." For "a practical separation from interstate commerce takes place when the products leave the terminals, if not when they are deposited there. Thereafter they are subject to the taxing power of the state." *Standard Oil Company of California v. The State of Washington, supra,* at 763.

And this postion has been sustained in recent cases presented to this court. See *B. F. Goodrich Co. v. State*, 38 Wn. (2d) 663, 231 P. (2d) 325 (1951), cert. denied, 342 U. S. 876; *Field Enterprises v. State*, 47 Wn. (2d) 852, 289 P. (2d) 1010 (1955), affirmed *per curiam*, 352 U. S. 806; *United States Steel Corporation v. State*, 51 Wn. (2d) 224, 316 P. (2d) 1099 (1957), dismissed for want of substantial federal question, 358 U. S. 46; *Crown Zellerbach Corporation v. State*, 53 Wn. (2d) 813, 328 P. (2d) 884 (1958), dismissed for want of substantial federal question, 359 U. S. 531.

For examples of factual-legal situations in which this court held that the Washington business and occupation tax may result in an impost upon commerce, we have *Fishers Blend Station v. Tax Commission*, 297 U. S. 650, 80 L. ed. 956, 56 S. Ct. 608 (1936); *Puget Sound Stevedoring Co. v. Tax Commission*, 302 U. S. 90, 82 L. ed. 68, 58 S. Ct. 72 (1937); *Gwin, White & Prince v. Henneford*, 305 U. S. 434, 83 L. ed. 272, 59 S. Ct. 325 (1939). Not even the petitioner has suggested that the foregoing cases are similar factually or legally to the case now at bar. On the other hand we do have the benefit of this court's review of four recent cases applying the same Washington business and occupation tax to the local business activities of large interstate concerns. In each case the taxpayer's business activities necessarily hinged upon the sale of products moving in interstate commerce. In each case this court sus-

tained the Supreme Court of the State of Washington or refused to grant a writ of certiorari. In each case the Washington Supreme Court had concluded that the business and occupation tax fell upon a purely local incidence of taxation. *B. F. Goodrich Co. v. State, supra; Field Enterprises v. State, supra; United States Steel Corporation v. State, supra; Crown Zellerbach Corporation v. State, supra.*

In the *United States Steel* case, *supra*, the appellant demanded that the Washington excise tax on wholesaling in Washington be apportioned so as to exclude products sold to Washington purchasers and delivered to them from points outside Washington via interstate carriers. The Washington Supreme Court (whose action was later upheld by this court) refused to do so, saying:

> "Appellant argues that the tax should be apportioned between interstate and local activities. There is no question of apportionment here. The tax is measured solely by appellant's local *wholesale and retail activities.* No part of the tax is attributable to its manufacturing or other out-of-state activities. The sales are negotiated within the state of Washington, and the fact that delivery is made direct to the purchaser does not change the nature of the local transaction. *Norton Co. v. Department of Revenue of Illinois*, 340 U. S. 534, 95 L. Ed. 517, 71 S. Ct. 377; *Field Enterprises v. State, supra.*" *United States Steel Corporation v. State, supra*, at 226. (Emphasis supplied.)

This court granted the state's motion to dismiss. The parallel between that case and this is obvious. In this case, the tax is measured solely by the value of products involved in purely local activities. Indeed, this case offers the further fact that here the products involved in the business activities subjected to taxation moved between two points entirely within the taxing jurisdiction.

To the same effect and in the same manner, this court granted the respondent's motion to dismiss the appeal from the decision of the Washington Supreme Court in *Crown Zellerbach Corporation v. State of Washington, supra,* holding that a tax imposed upon the privilege of manufacturing may be measured without apportionment of the proceeds of sale on the basis of the place of sale when a substantial volume of the products so manufactured was designated for shipment outside the state of Washington.

2. The Washington Tax Cannot Be Duplicated Elsewhere.

The Washington Supreme Court recognized the multiple burdens test in its denial of the petitioner's claim that the wholesaling functions tax in question constituted an impost upon interstate commerce. The Washington Supreme Court stated that:

> "* * * The transfer of these products to bulk plants for distribution to ultimate consumers or retail dealers is not an activity which is duplicated in any other state; therefore no other state can with equal right impose a similar tax." *Standard Oil Company of California v. State, supra,* at 763.

The declaration of this court in *Western Live Stock v. Bureau of Revenue*, 303 U. S. 250, 82 L. ed. 823, 58 S. Ct. 546 (1938), seems apropos, if it is not dispositive of the petitioner's contention:

> "As we have said, the carrying on of a local business may be made the condition of state taxation, if it is distinct from interstate commerce, and the business of preparing, printing and publishing magazine advertising is peculiarly local and distinct from its circulation whether or not that circulation be interstate commerce. *Cf. Puget Sound Stevedoring Co. v. Tax Commission*, 302 U. S. 90, *ante*, 68, 58 S. Ct. 72. No one would doubt that the tax on the privilege would be valid if it were measured by the amount of advertising space sold. *Utah Power & L. Co. v. Pfost*, 286 U. S. 165, 76 L. ed. 1038, 52 S. Ct. 548, *supra*; *Federal Compress & Warehouse Co. v. McLean*, 291 U. S. 17, 78 L. ed. 622, 54 S. Ct. 267, or by its value. *Oliver Iron Min. Co. v. Lord*, 262 U. S. 172, 67 L. ed. 929, 43 S. Ct. 526; *Hope Natural Gas Co. v. Hall*, 274 U. S. 284, 71 L. ed. 1049, 47 S. Ct. 639. Selling price, taken as a measure of value whose accuracy appellants do not challenge, is for all practical purposes a convenient means of arriving at an equitable measure of the burden which may be imposed on an admittedly taxable subject matter. * * *" 303 U. S. 250, 258.
>
> "* * * All the events upon which the tax is conditioned — the preparation, printing and publication of the advertising matter, and the receipt of the sums paid for it—occur in New Mexico and not elsewhere. All are beyond any

control and taxing power which, without the commerce clause, those states could exert through its dominion over the distribution of the magazine or its subscribers. The dangers which may ensue from the imposition of a tax measured by gross receipts derived directly from interstate commerce are absent." 303 U.S. 260.

3. A Reasonable Non-discriminatory Tax May Incidentally Impinge Upon Products in Interstate Commerce.

If we were to assume for the moment that the tax was a direct tax upon the products rather than upon the privilege of engaging in business in the state of Washington, the tax is not *ipso facto* incompatible with the federal commerce clause.

In the decision from which the petition is here taken, the Washington Supreme Court gave full cognizance to the decisions of this supreme court establishing this proposition observing that:

"* * * It is well settled that an activity may be related to interstate commerce and at the same time be subject to state taxation. [Citing *Michigan-Wisconsin Pipe Line Co. v. Calvert*, 347 U. S. 157, 98 L. ed. 583, 74 S. Ct. 396.]"

"* * * a tax upon such intrastate activities as the sale, withdrawal, or distribution of a commodity moving in interstate commerce, after it has come to rest in the taxing state and its interstate voyage has ended, whether or not it remains in the original package, does not violate the interstate commerce clause so long as

there is no discrimination against the commodity because of its origin in another state. *Eastern Air Transport v. South Carolina Tax Commission*, 285 U. S. 147, 76 L. Ed. 673, 52 S. Ct. 340; *Nashville, C. & St. L. R. Co. v. Wallace*, 288 U. S. 249, 77 L. Ed. 730, 53 S. Ct. 345, 87 A. L. R. 1191; *Edelman v. Boeing Air Transport*, 289 U. S. 249, 77 L. Ed. 1155, 53 S. Ct. 591; *Monamotor Oil Co. v. Johnson*, 292 U. S. 86, 78 L. Ed. 1141, 54 S. Ct. 575; *Henneford v. Silas Mason Co.*, 300 U. S. 577, 81 L. Ed. 814, 57 S. Ct. 524; and *McGoldrick v. Berwind-White Coal Mining Co.*, 309 U. S. 33, 84 L. Ed. 565, 60 S. Ct. 388, 128 A. L. R. 876." *Texas Company v. Cohn*, 8 Wn. (2d) 360, 112 P. (2d) 522, at 389.

Many other commerce clause cases of this court sustain the foregoing principle. See *Hump Hairpin Mfg. Co. v. Emmerson*, 258 U. S. 290, 66 L. ed. 622, 42 S. Ct. 305 (1922); *Spector Motor Service, Inc. v. O'Connor*, 340 U. S. 602, 95 L. ed. 573, 71 S. Ct. 503 (1951); *J. D. Adams Mfg. Co. v. Storen*, 304 U. S. 307, 82 L. ed. 1365, 58 S. Ct. 913 (1938); *American Mfg. Co. v. St. Louis*, 250 U. S. 459, 63 L. ed. 1084, 39 S. Ct. 522 (1919); *Western Live Stock v. Bureau of Revenue*, 303 U. S. 250, 82 L. ed. 823, 58 S. Ct. 546 (1938), *supra*.

As stated in the *Hump Hairpin Mfg.* case, *supra*: "The turning point of these decisions is whether, in its incidence, the tax affects interstate commerce so directly and immediately as to amount to a genuine and substantial regulation of, or restraint upon,

it, or whether it affects only incidentally or remotely. * * *"

Similarly as stated in *Henneford v. Silas Mason Co.*, 300 U. S. 577, 81 L. ed. 814, 57 S. Ct. 524, at 81?:

> "Things acquired or transported in interstate commerce may be subjected to a property tax, non-discriminatory in its operation, when they have become part of the common mass of property within the state of destination. * * *"

B. REBUTTAL OF PETITIONER'S ARGUMENT.

The focal point of the petitioner's whole plea to this court, as it was before the trial court and as it was before the Washington State Supreme Court, with respect to the federal commerce clause question is whether *Standard Oil Co. v. Federal Trade Commission*, 340 U. S. 231, 95 L. ed. 239, 71 S. Ct. 240 (1951), would preclude the imposition of the tax in question. Is the doctrine of *Standard Oil v. Federal Trade Commission*, *supra*, in any way in conflict with any of the authorities cited by respondent? The answer is *No!*

1. **Standard Oil Co. v. Federal Trade Commission.**

As indicated above, we think it is so clear that the case of *Standard Oil Co. v. Federal Trade Commission*, *supra*, is so far distinguishable from the case at bar that there is little doubt that the petitioner has failed to state a federal question.

The case is to be distinguished on several counts, not the least of which is the fact that this court was

there concerned solely with the question of whether or not the Federal Trade Commission's jurisdiction for the purposes of the Clayton Act, as amended by the Robinson-Patman Act, extended beyond the point of storage of products destined for further distribution within the state of Michigan.

Again the Washington State Supreme Court succinctly stated this court's holding of the case in concluding that the U. S. Supreme Court

> "* * * did not say that the oil had gained *no* intrastate character, but simply said that it had not been deprived of its interstate character for purposes of the act [Robinson-Patman Act]. It is well settled that an activity may be related to interstate commerce and at the same time be subject to state taxation. The applicable principle is clearly stated in *Michigan-Wisconsin Pipe Line Co. v. Calvert*, 347 U. S. 157, 98 L. Ed. 583, 74 S. Ct. 396, as follows:
>
> "'* * * Numerous cases have upheld state levies where it is thought that the tax does not operate to discriminate against commerce or unduly burden it either directly or by the possibility of multiple taxation resulting from other taxes of the same sort being imposed by other states. The recurring problem is to resolve a conflict between the Constitution's mandate that trade between the states be permitted to flow freely without unnecessary obstruction from any source, and the state's rightful desire to require that interstate business bear its proper share of the costs of local government in

> return for benefits received. * * * It is *now well-settled that a tax imposed* on a local activity related to interstate commerce is valid if, and only if, the local activity is not such an integral part of the interstate process, the flow of commerce, that it cannot realistically be separated from it. [citing cases]. And if a genuine separation of the taxed local activity from the interstate process is impossible, it is more likely that other states through which the commerce passes or into which it flows can with equal right impose a similar levy on the goods, with the net effect of prejudicing or unduly burdening commerce.'" *Standard Oil Co. v. State, supra,* at 762. (Emphasis supplied.)

2. Petitioner's Commerce Clause Argument Is Based Upon a False Premise.

Observe that the petitioner's whole commerce clause argument, which argument mistakenly assumes that the product is still in interstate commerce when distributed from terminal tank farms to the bulk stations, is based upon the proposition that if the product is still in interstate commerce for purposes of Congressional regulatory power, that product, therefore, is beyond the pale of state taxing power. This proposition is patently false. Mr. Justice Frankfurter took great pains to lay this error to rest in *Central Greyhound Lines v. Mealey,* 334 U. S. 653, 92 L. ed. 1633, 68 S. Ct. 1260 (1948) at page 1637, which held that New York could tax certain transportation activities which were concededly

within the regulatory power of Congress, when he said that:

> "This case serves to remind once more that courts do not adjudicate abstractions, such as, 'What is interstate commerce?' Also, it again illustrates that even if it be found that certain transactions in fact constitute interstate commerce, such conclusion does not answer the further inquiry whether a particular assertion of power by a State over such transactions offends the Commerce Clause."

3. Michigan-Wisconsin Pipe Line Co. v. Calvert.

The petitioner would rely upon the rule of the *Michigan-Wisconsin Pipe Line, supra*, discussed in the opinion of the Washington State Supreme Court from which petitioner seeks relief. (Pet. p. 17 *et seq.*) We urge the court to examine carefully the holding in *Michigan-Wisconsin Pipe Line Co. v. Calvert, supra*, for the holding of that case is actually in harmony with respondent's theory of this case, ever though the case is distinguishable, factually.

The taxing incidence there was the act of taking goods already produced, gathered and processed by others *for transmission through interstate pipelines.* In condemning the tax in that case, this court declared that the "taking" in question was solely "for interstate transmission and the commodity at that time is not only actually committed to, but is moving in interstate commerce."

Obviously from the facts of the case at bar the incidence of taxation here is not a single act of "tak-

ing," but is instead the integrated process of "engaging in business activities within the state of Washington." And the products involved in the petitioner's business activities in this case were not committed to interstate commerce, but had in fact reached their destination and had been placed in storage before the commencement of petitioner's business activities which were taxed in this case.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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Attorneys for Respondent.

APPENDIX A

Provisions of the Revised Code of Washington Applied to the Petitioner

RCW 82.04.220 There is levied and shall be collected from every person a tax for the act or privilege of engaging in business activities. Such tax shall be measured by the application of rates against value of products, gross proceeds of sales, or gross income of the business, as the case may be.

RCW 82.04.296 From and after the first day of May, 1955, there is levied and shall be collected from every person for the act or privilege of engaging in business activities, as a part of the tax imposed by this chapter, other than those activities taxed pursuant to RCW 82.04.260, an additional tax in the amount of sixty percent of the tax payable under this chapter: *Provided*, That from April 1, 1959 until July 1, 1961 the additional tax imposed under this section shall be in the amount of seventy-six percent of the tax payable under this chapter. To facilitate collection of this additional tax, the tax commission is authorized to adjust the basic rates of persons to which this section applies in such manner as to reflect the exact amount of the additional tax hereby imposed.

Definitions

RCW 82.04.030 "Person" or "c o m p a n y," herein used interchangeably, means any individual, receiver, assignee, trustee in bankruptcy, trust, estate, firm, copartnership, joint venture, club, com-

pany, joint-stock company, business trust, municipal corporation, corporation, association, society, or any group of individuals acting as a unit, whether mutual, cooperative, fraternal; nonprofit, or otherwise and the United States or any instrumentality thereof.

RCW 82.04.040 "Sale" means any transfer of the ownership of, title to, or possession of property for a valuable consideration and includes any activity classified as a "sale at retail" or "retail sale" under RCW 82.04.050. It includes renting or leasing conditional sale contracts, leases with option to purchase, and any contract under which possession of the property is given to the purchaser but title is retained by the vendor as security for the payment of the purchase price. It also includes the furnishing of food, drink, or meals for compensation whether consumed upon the premises or not.

"Casual or isolated sale" means a sale made by a person who is not engaged in the business of selling the type of property involved.

RCW 82.04.060 "Sale at wholesale" or "wholesale sale" means any sale of tangible personal property which is not a sale at retail and means any charge made for labor and services rendered for persons who are not consumers, in respect to real or personal property, if such charge is expressly defined as a retail sale by RCW 82.04.050 when rendered to or for consumers: *Provided*, That the term "real or personal property" as used in this section

shall not include any natural products named in RCW 82.04.100.

RCW 82.04.070 "Gross proceeds of sales" means the value proceeding or accruing from the sale of tangible personal property and/or for services rendered, without any deduction on account of the cost of property sold, the cost of materials used, labor costs, interest, discount paid, delivery costs, taxes, or any other expense whatsoever paid or accrued and without any deduction on account of losses.

RCW 82.04.140 "Business" includes all activities engaged in with the object of gain, benefit, or advantage to the taxpayer or to another person or class, directly or indirectly.

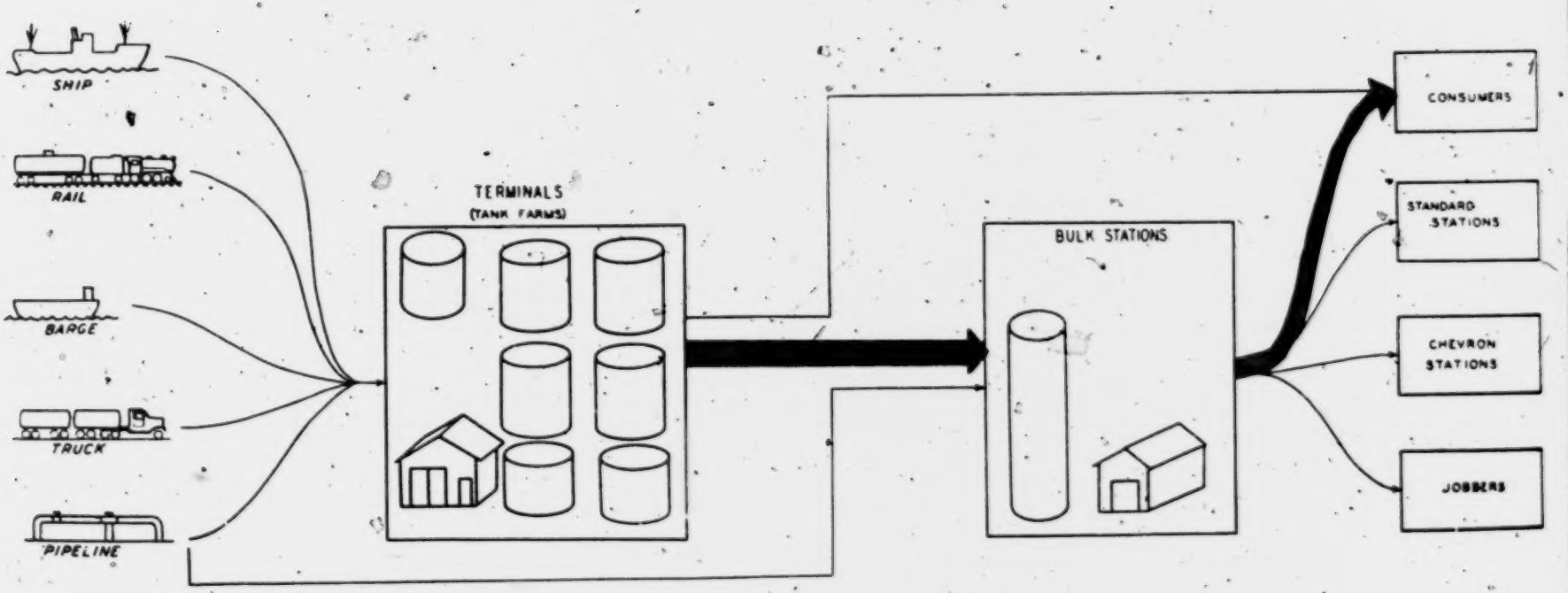
RCW 82.04.150 "Engaging in business" means commencing, conducting, or continuing in business and also the exercise of corporate or franchise powers as well as liquidating a business when the liquidators thereof hold themselves out to the public as conducting such business.

APPENDIX B

Statutory Classifications of Other "Business Activities" Subject to Washington Business and Occupation Tax

RCW 82.04.230	(Extractors)
RCW 82.04.240	(Manufacturers)
RCW 82.04.250	(Retailers)
RCW 82.04.260	(Wholesalers of Wheat, Oats, Corn, Barley — Flour Millers — Seafood Products)
RCW 82.04.275	(Wholesale Sales of Cigarettes)
RCW 82.04.280	(Printers and Publishers — Public Road Contractors — Extractors and Processors for Hire — Cold Storage Warehousemen — Lessors)
RCW 82.04.290	(Service and Other Activities).

ILLUSTRATION NO. 1.



Petitioners Petroleum Marketing System in Washington.

APPENDIX C

Key to Illustration No. 1

1. Terminals are "warehouses or other central locations" (RCW 82.04.270), supplied by various transportation media from points outside Washington.
2. Bulk stations further sell or distribute petitioner's petroleum products to
   (a) Retail consumers (for purposes other than resale);
   (b) Standard stations (for resale);
   (c) Chevron stations (for resale);
   (d) Jobbers (for resale).
3. The legal incidence of taxation here is the privilege of engaging in "business activities" in the state of Washington (RCW 82.04.220), to-wit (RCW 82.04.270 (2), *supra*):

   "* * * upon every person engaged in the business of distributing in this state articles of tangible personal property * * * the intent hereof being to impose a tax equal to the wholesaler's tax upon persons performing functions essentially comparable to those of a wholesaler, but not actually making sales. * * *"
4. Only the products distributed from terminal to bulk station and in turn sold to consumers (heavy-type arrows) is included in the tax base.
5. Illustration No. 1 is based upon respondent's Exhibit M (St. 159).